United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1271

To be argued by
SHEILA GINSBERG

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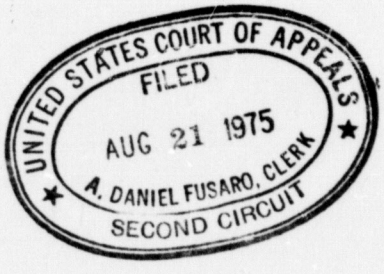
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ANDRES ROMAN, Appellant.	Docket No. 75-1271

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the District Court's failure to consider testimony admitted into evidence as part of the defense case and critical on the issue of appellant Roman's possession of the drugs is reversible error.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment rendered after a non-jury trial in the United States District Court for the Southern District of New York (The Honorable Kevin Thomas Duffy) convicting appellant of one count of possession with intent to distribute Schedule I and Schedule II controlled substances, in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(A). On June 30, 1975, imposition of sentence was suspended and appellant was placed on probation for a period not to exceed two years.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

A one-count indictment* charged that, on June 14, 1973, appellant Andres Roman possessed with intent to distribute 3.07 grams of heroin, 4.04 grams of cocaine, and 8.55 grams of methadone. These drugs were seized from various locations in Apartment 15-16 at 1980 Second Avenue during a search of

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*This indictment (73 Cr. 977) is annexed as "B" to appellant's separate appendix.

that apartment conducted pursuant to a search warrant* (34-35**). The apartment was not rented to appellant, but rather to Ignacia Rosario,*** his common-law wife (102).

None of the drugs were found in appellant's possession, and there was no fingerprint testimony to establish that he had ever touched the drugs (42). Appellant, Ignacia Rosario, and three small children, ages three, four, and seven, were asleep in the apartment when the agents arrived (41).

The events leading up to the search and upon which the warrant was based**** began on May 2, 1973, when Don Sturn, a special agent with the Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, went to Apartment 15-16 and there spoke with Ignacia Rosario and her son, Domingo Rosario, about the future purchase of heroin. Sturn returned to the apartment on May 11, 1973, and, again dealing with Ignacia and Domingo Rosario and also one Carolyn Baxter, he purchased two packages of heroin totalling approximately 18 grams in weight (92). On May 22, at the same

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*The search warrant and supporting affidavit are "D" to appellant's separate appendix.

**Numerals in parentheses refer to pages of the transcript of the trial.

***See the rider to the affidavit of Agent Don Sturn in suport of the search warrant, part of appellant's separate appendix "D".

****See Appendix "D", affidavit of Sturn in support of his application for a search warrant.

address, Domingo delivered another 15.7 grams of heroin to Sturn. Ignacia Rosario also participated in this sale (93). On both of these latter occasions, according to Sturn, he observed Ignacia Rosario selling drugs to other customers (95). On June 5, 1973, Sturn negotiated with Ignacia and Domingo Rosario for the sale of an eighth kilo of heroin, to be delivered on June 7, 1973 (84).

There was no evidence presented to establish that appellant Roman participated in any of these transactions. He was not even present in the apartment until June 5, 1973, and then he was merely introduced to Sturn as Ignacia's husband. The two men exchanged greetings, but Roman did not discuss drugs or in any way involve himself in the negotiations (84).

When Sturn returned on June 7 to complete the deal, he learned from Domingo that the deal had fallen through because Domingo had been unable to make his connection (85).* Over objection, Sturn was permitted to testify that it was at that juncture that appellant Roman volunteered he had a good connection and could supply Sturn with the eighth kilo of heroin the latter had ordered from Domingo (86). That deal was never consummated, and this testimony by Sturn was

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*In a separate four-count indictment (73 Cr. 981), Ignacia Rosario, Domingo Rosario, and Caroline Baxter were charged with conspiracy to sell narcotics and with three substantive sales.

received solely on the issue of appellant Roman's intent to distribute drugs (87).

On June 14, 1973, at 5:30 a.m., Robert Walker, a special agent with the Bureau of Narcotics and Dangerous Drugs assigned to the New York Joint Task Force (10), and eight other officers (18) forced their entry into Apartment 15-16 (43)* using a crowbar. Some of the officers carried shotguns (72); others had their pistols drawn (43). When they found appellant asleep in one of the bedrooms, they placed him under arrest (13) and informed him of his Miranda rights (60).

Scattered throughout the apartment -- in the bedrooms, living room, kitchen, and bathroom -- the agents found small foil packets of cocaine, heroin, some marijuana, methadone,** a jar of lactose,*** a small scale, and 700 small, empty glassine envelopes (13-37).**** When appellant, who was still in the bedroom, was asked whose "stuff" this was (referring to the drugs found in the bedroom), he admitted, according to Detective Michael Spatano, that it belonged to him (61). Further, after the officers completed their

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*The search warrant was obtained pursuant to the "no-knock" provisions of 21 U.S.C. §879(a) and (b).

**By stipulation, the Government introduced the chemical composition of the drugs found (104).

***Walker testified that lactose is a cutting agent used to increase the volume of narcotics (36).

****Defense counsel objected (15, 21, 24) to all this evidence insofar as it was unconnected to appellant Roman.

search and conducted appellant and his wife from the apartment, appellant repeated that "all the stuff in the apartment belonged to him." At that point, according to Spatano, appellant's wife volunteered that appellant's admission was truthful and that "all the stuff was his" (63). Lieutenant Alfred Costanzo of the New York City Police Department, who was present when appellant made these admissions, testified that in his experience as a police officer, he was aware of situations in which innocent persons admit guilt to protect others (75).*

At the close of the Government's case defense counsel moved for a dismissal of the indictment for failure by the Government to prove a prima facie case. The motion was denied (104).

In defense, appellant presented the testimony of Kevin Daly, a detective with the New York City Police Department. Daly was one of the officers who participated in the search of Apartment 15-16 (107). Daly had also interviewed Domingo Rosario after Domingo's arrest later on the morning of June

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*It appears from the minutes of the proceeding in which Ignacio Rosario was sentenced after pleading guilty to the conspiracy charged to her, Domingo Rosario, and Caroline Baxter (73 Cr. 981), that Ignacia Rosario had an extensive criminal record. That record included two prior felony convictions for dealing in narcotics. Ms. Rosario was sentenced to a four-year term of imprisonment.

14, 1973. After being informed of his Miranda rights, Domingo admitted that he lived at 1980 Second Avenue** and that all the "stuff" the agents had found in the apartment was his. He asserted that his mother, Ignacia Rosario, had nothing whatsoever to do with it (108). The Government's objection to this evidence was overruled (108).

In his opinion** holding taht appellant was guilty of possession of the drugs seized from the apartment, Judge Duffy specifically found as a fact that appellant had admitted that the "stuff" belonged to him (Opinion at 7-8). However, the Judge's finding that this admission was sufficient to establish the requisite proprietary interest in the drugs was not based on a complete and accurate appraisal of the record. In his recitation of the evidence, the Judge incorrectly asserted that the defense had not called any witnesses (Opinion at 6). Apparently the Judge had forgotten*** that appellant had introduced the testimony of Detective Daly to establish that appellant's admission of ownership was contested by Domingo Rosario who also admitted ownership of the drugs in order to protect his mother.

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*Domingo Rosario apparently had two addresses; in Government Form #202, a personal history form completed after his arrest, he gave his address as 1830 Anthony Avenue in the Bronx (109).

**The opinion is annexed as "C" to appellant's separate appendix.

***The trial was conducted on November 11, 1974; the opinion was not rendered until June 2, 1975.

On June 30, 1975, imposition of sentence upon appellant Roman was suspended, and appellant was placed on probation for a period not to exceed two years. The geographic limits of probation were extended to such places as Ignacia Rosario was incarcerated.

ARGUMENT

THE DISTRICT COURT'S FAILURE TO CONSIDER TESTIMONY ADMITTED INTO EVIDENCE AS PART OF THE DEFENSE AND CRITICAL ON THE ISSUE OF APPELLANT ROMAN'S POSSESSION OF THE DRUGS IS REVERSIBLE ERROR.

The Government's only evidence to establish appellant's proprietary interest in the drugs seized from Apartment 15-16 was appellant's admission, made during the search, that the "stuff" belonged to him. This admission was made shortly after appellant was awakened at 5:30 a.m. by the forced entry of nine officers, some of whom carried shotguns and others of whom carried drawn pistols. Still in bed with his seven-year old child, appellant was placed under arrest. Also arrested at that time was appellant's wife, who had been asleep in another bed with two other children aged three and four.

At the trial, it was appellant's defense that while he had indeed made the statement, he had done so in order to protect his wife. Appellant's motivation was, at least in part, inspired by the fact that Ignacia Rosario had a sub-

stantial prior criminal record. Clearly, if she were to be convicted again for yet another violation of the narcotics laws,* she would surely face a substantial period of incarceration, far greater than what appellant risked. Moreover, as a parent appellant was no doubt concerned about who would care for their young children if his wife went to prison. Appellant's mistaken belief that he could protect his wife by lying was doubtless fostered by the early morning hour, the interruption of sleep, and the fear engendered by the intrusion of several strangers carrying shotguns and wielding pistols in the apartment.

In support of the theory that appellant's assertions of ownership of the drugs were untrue, the defense offered evidence that Domingo Rosario, in a similar attempt to protect Ignacia, claimed that the drugs were his and that his mother had no connection whatever with them. Detective Daly, who participated in the processing of Domingo after his arrest, testified for the defense that, after being warned of his Fifth Amendment rights, Domingo made this statement acknowledging his exclusive guilt.

Obviating defense counsel's need to place Domingo Rosario on the witness stand, Judge Duffy overruled the Government's objections to the admission of Detective Daly's

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*Ignacia Rosario was plainly desparate for appellant's offer of protection since, despite the overwhelming evidence of her involvement in the drug operation, she disclaimed any responsibility and agreed with appellant that the drugs were his.

testimony and allowed it into evidence. Nonetheless, in his opinion concluding that appellant was guilty of possession of these drugs, Judge Duffy explicitly relied on appellant's admission but ignored the existence of Daly's testimony, mistakenly stating that "The defense presented no witnesses." The failure to consider Daly's testimony in evaluating the credibility of appellant's confession is error mandating reversal.

First, Daly's testimonial assertions were non-hearsay, circumstantial evidence of Domingo's state of mind when the latter made his confession. 6 Wigmore, ON EVIDENCE, §1790 (1940). The record establishes without a doubt that Domingo was intimately involved in the drug business operated in Apartment 15-16, and was therefore aware of its participants. Significantly, Domingo made no mention of appellant in his statement to Daly. To the contrary, cognizant as he was of his mother's culpability and particular vulnerability in any further prosecutions, Domingo Rosario chose to shoulder the entire responsibility himself. Evidence that another was similarly compelled to protect the same unquestionably guilty party is probative of appellant's motivation in making his admissions to the police. Had appellant in fact been in any way involved in the drug business Domingo would have been aware of that involvement and could have accomplished his goal of protecting his mother without acknowledging his own guilt merely by stating that the siezed drugs belonged to appellant.

Alternatively, Domingo's admissions when offered for truth of the assertions contained therein, squarely contradict appellant's claim of ownership of the drugs and therefore exonerate him. Judge Duffy properly admitted Domingo's statement into evidence as an exception to the hearsay rule.

At the time of appellant's trial, Domingo had not yet been tried on the charges of both conspiracy to sell and the substantive sales of narcotics for which he had been indicted. He was therefore protected by the Fifth Amendment from being required to testify at appellant's trial, and was thus an unavailable witness. Federal Rules of Evidence, §804(a)(1); United States v. Mobley, 421 F.2d 345, 351 (5th Cir. 1970).* Moreover, since Domingo's statement to Detective Daly was clearly against his own penal interest and was amply corroborated by Agent Sturn's testimony of Domingo's guilt, the statement was competent evidence. Federal Rules of Evidence, §804(b)(3); see also Chambers v. Mississippi, 410 U.S. 284, 298-303 (1973); United States v. Dovico, 380 F.2d 325 (2d Cir.), cert. denied, 389 U.S. 944 (1967).**

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*United States v. Sanchez, 459 F.2d 100 (2d Cir. 1972), does not conflict with this finding of unavailability since the requirement in Sanchez that a witness first be called to testify before he is found to be recalcitrant was based on this Court's holding that the witness there had no Fifth Amendment privilege.

**Should this Court find that Daly's testimony was inadmissible as hearsay, the case must be remanded to provide appellant an opportunity to present Domingo's testimony. The admission of the evidence below lulled defense counsel into assuming that the evidence, once received, would be

Without appellant's admissions of ownership of the drugs, the record below is completely devoid of any indication that appellant had the necessary possession of the narcotics to establish his guilt of the charge. Indeed, all the record showed -- and showed in abundance -- was that appellant lived in Apartment 15-16 along with his wife Ignacia and stepson Domingo, and that it was not appellant, but rather Ignacia, Domingo, and others who conducted a rather active narcotics business from the apartment. Prior to the search which produced the drugs, all the drug purchases made by the undercover officers were from Ignacia and Domingo. The type of drugs involved, the quantities purchased, and the fact that Ignacia also sold small quantities of drugs to street customers establish that the drugs, the scales, the lactose, and the empty glassine envelopes seized were all part of the inventory and tools of Ignacia's operation.

Agent Sturn's testimony that appellant at one time offerec a substitute supply of heroin when Ignacia's partner, Domingo, had failed to supply a promised eighth kilo does not contradict this conclusion. That evidence, introduced to show that appellant had the requisite intent to

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(Footnote continued from page 11)

fairly evaluated. If this is not to be the case, appellant is entitled to compensate for the newly created gap in his defense. Cf. United States v. Kaplan, 510 F.2d 606, 613 (2d Cir. 1974) (opinion denying rehearing).

distribute drugs, is in no way probative of his possession of Ignacia's drugs. To the contrary, that evidence indicates that appellant's offer to deal from an apparently different and private source was separate and apart from the offer made by Ignacia and Domingo.

At most the Government's evidence, without appellant's admission, establishes only his knowing presence in the apartment. Standing alone, this is insufficient to establish the necessary possession of the drugs. United States v. Steward, 451 F.2d 1203 (2d Cir. 1971); United States v. Kearse, 444 F.2d 62 (2d Cir. 1971).

Because appellant's admissions were critical to the Government's case, the trial judge's failure to consider competent and relevant evidence which attacked the truthfulness of those admissions requires reversal.

CONCLUSION

For the foregoing reasons, the judgment must be reversed and the case remanded to the District Court to permit the District Judge to consider all the evidence.

Respectfully submitted,

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Certificate of Service

Aug 21, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Sheila Gendzier